11-641

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 277.

HARVEY KENNEDY, EXECUTOR OF JAMES C. KENNEDY, DECEASED, APPELLANT,

vs.

JOHN A. J. CRESWELL, ROBERT H. T. LEIPOLD, AND ROBERT PURVIS, COMMISSIONERS OF THE FREEDMAN'S SAVINGS AND TRUST COMPANY.

BAR ASSOCIATION

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 12, 1877.

o pay their debt. But the plaintiffs refused to receive it in payment. Instead of doing this, they informed the defendants that the money was subject to their order. The note, therefore, was not paid. The creditor did not consent to receive the money in payment, and without such consent there could be no payment." (Kingston Bank *v.* Gay, 19 Barb., 460, bottom; per Ira Harris, J.)

EDWIN B. SMITH,
Assistant Attorney-General.

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11-641

Dismissed
Atkinson
Brady

Filed
April 23

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1 *Bill of complaint of the commissioners of the Freedman's Savings & Trust Co.—Filed March 2nd, 1875. R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESWELL, ROBERT PURVIS, & Robert H. T. Leipold, commissioners of the Freedman's Savings and Trust Company,
vs.
HARVEY KENNEDY, EXECUTOR OF THE LAST will of James C. Kennedy, deceased, Julia R. Kennedy, Ezra T. Kennedy, Lauren O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin K. Kennedy, William S. Kennedy, and Abigail Kennedy, William H. Ward, Fanny Eames, Isabella Eaton, Paul Eaton.

The bill of complaint of John A. J. Creswell, Robert Purvis, and Robert H. T. Leipold, commissioners of the Freedman's Savings
2 and Trust Company, against the above-named defendants.

These complainants, who sue as well for themselves as for all other creditors of James C. Kennedy, late of the District of Columbia, deceased, who will come in and contribute to the expense of this suit, respectfully show as follows:

First. That the said James C. Kennedy, late of the city of Washington, in the District of Columbia, was indebted unto the Freedman's Savings and Trust Company in the sum of twelve thousand dollars, for which sum he made his certain promissory note, bearing date the 27th day of March, 1872, whereby he promised to pay, on demand, to his own order, the said sum of $12,000.00, with interest at ten per centum per annum, and endorsed and delivered the same to the said Freedman's Savings and Trust Company, and that payment of said note was long ago demanded.

3 Second. That being so indebted, the said James C. Kennedy did on the 25th day of March, 1873, depart this life, in the city of Washington, in the District aforesaid, leaving a last will and testament, executed in the State of New York, and bearing date the 10th day of February, 1857, wherein and whereby he gave and bequeathed unto James Kennedy, his father, and unto Lucinda Kennedy, his mother, and to his widow, and to his sisters and brothers hereinafter named, and to his aunt, Abigail Kennedy, large sums of money; that he was childless, but left a widow, Julia R. Kennedy, and his brothers and sisters, Ezra Thomas Kennedy, Laura O. Kennedy, Harvey Kennedy, Martin R. Kennedy, William S. Kennedy, and Lucinda Stewart, his heirs at law; that said Harvey Kennedy and one Daniel Stewart, since deceased, were named as executors in said last will and testament.

4 Third. That letters testamentary of all and singular the personal estate of the said James C. Kennedy was, on the 22nd day of July, 1873, granted unto the said defendant Harvey Kennedy, of the city and county of Albany, in the State of New York, and by virtue of said letters and of said will the said Harvey Kennedy has possessed himself of all the personal property of the said deceased, James C. Kennedy.

Fourth. That the complainants are advised that the personal property

of said deceased was not sufficient to pay all his debts, and that the same has been applied by the said Harvey Kennedy to the payment of other debts against said estate, leaving the debt due to your orators, as well as other debts due to other persons, amounting, in the aggregate, to large sums of money, wholly unpaid and unsatisfied, and that the said Harvey Kennedy has wholly neglected to pay any part of the aforesaid
5 claim of the Freedman's Savings and Trust Company, or to render a proper account of and concerning said personal estate, and the complainants are advised and believe that they are entitled to have the real estate of the said deceased sold and the proceeds thereof applied to the payment of his just debts.

Fifth. That at the time of the demise of the said James C. Kennedy he was *was* seized and possessed of an undiv'ed moiety of lots twelve (12) and fifteen (15) and part of lots thirteen (13) and fourteen (14), in square numbered two hundred and twenty-one (221), in the said city of Washington, in the District aforesaid, within the following metes and bounds: Beginning at the northeast corner of lot fifteen (15) in said square, and running thence west along the south line of H street fifty-five (55) feet; thence south fifty-six (56) feet; thence west one
6 hundred and five (105) feet four (4) inches, to the west line of said square; thence south, along the west line of said square, fifty-five (55) feet; thence east one hundred and sixty (160) feet and four (4) inches to the southeast corner of said lot fifteen (15), and thence north to the place of beginning. He died seized also of a part of lot numbered three (3), all of lots numbered four (4) and five (5), and a part of lot numbered six (6), in square numbered two hundred and twenty (220) in said city and District.

The said James C. Kennedy did, some time in September, 1871, convey all of the said property in said square two hundred and twenty (220) to *to* William H. Ward, in trust, to secure the payment of seventeen thousand dollars ($17,000.00), three years after the date of said deed, to Mrs. Fanny Eames, which debt is now overdue, but how much, if
7 any, remains unpaid complainants cannot state.

The said James C. Kennedy died seised and possessed, also, of the dwelling-house and premises on H street, in the city of Washington, in the District aforesaid, in square numbered two hundred (200), described as follows, to wit: Beginning forty-five (45) feet west from the southeast corner of said square, and running thence north, with the center of the wall between the residence formerly occupied by S. C. Pomeroy, and the house east of it, and extending to the south side of the grounds of the Arlington House; thence northwesterly with said line to the property of Mrs. Freeman; thence south on the east line of Mrs. Freeman's property to H street, and thence east to the place of beginning.

The said James C. Kennedy did, on the 1st day of November,
8 1870, by a deed convey the said house and premises last above described to Daniel L. Eaton, now deceased, to secure the payment to the said Freedman's Savings and Trust Company of a promissory note for the sum of $10,000, within one year from the date of said deed.

The said Freedman's Savings and Trust Company subsequently transfer'ed the said note, but to whom these complainants do not know, and how much, if anything, remains due on the said trust they cannot state.

Sixth. The said James C. Kennedy, as the complainants are informed and believe, died seised of other large tracts of valuable real estate in

the District aforesaid, which these complainants are unable to describe, and which ought to be sold to pay the indebtedness of the said estate.

Seventh. The said last will and testament left by the said testator was executed in the presence of only two subscribing witnesses, and, as the complainants are informed and believe, long before the said James C. Kennedy acquired the real estate and premises herein described.

Eighth. That these complainants were duly appointed and qualified as commissioners of the Freedman's Savings and Trust Company about the *the* 9th day of July, 1874, to take charge of the property of the Freedman's Savings and Trust Company and to settle its affairs by virtue of an act of Congress approved June 20th, 1874, and they bring this bill as such commissioners.

Ninth. That the said Daniel L. Eaton long since departed this life, leaving Paul Eaton and Isabella Eaton, infants under age, his heirs at law herein surviving.

The complainants pray as follows, to wit:

1. That a writ of subpœna of the United States may issue in the usual form addressed to each of the said defendants.

2. That the said defendant Harvey Kennedy may be compelled, by the decree of this court, to account for the personal property by him received from the said estate.

3. That said defendant Harvey Kennedy may be compelled to discover, upon his oath, the amount remain'g due upon each of the pieces of real property herein described, and to discover the names and places of abode of the owners and holders of such incumbrances.

4. That said Harvey Kennedy may be compelled to discover and set forth all other real estate in the said District to which his said testator had a title in law or in equity; to discover the nature of his estate in and the incumbrances due or to become due on each piece or parcel of ground, and to discover the names and address of the owners and holders of such incumbrances.

5. That the real estate belonging to the estate may be sold, or so much thereof as may be necessary, and that the proceeds may be applied to the payment of the debts due from the estate of the said James C. Kennedy.

6. That the complainants may have such other and further relief as their case may require.

JOHN A. J. CRESWELL.
ROBERT PURVIS.
R. H. T. LEIPOLD.

ENOCH TOTTEN,
Sol'r for Pl'ffs.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Robert H. T. Leipold, being first duly sworn, do depose and on my oath say that I am one of the plaintiffs in the before mentioned cause; that I have read the foregoing bill, and know the contents thereof; that the facts therein stated, of my personal knowledge, are true, and those stated upon information and belief I believe to be true.

ROBERT H. T. LEIPOLD.

Subscribed and sworn to before me this 1st day of March, A. D. 1875.

[SEAL.] WILLIAM WILSON, *J. P.*

13 *John A. J. Creswell et al. commissioners of Freedman's Savings & Trust Co.—Filed Apr'l 28th.—R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESWELL ET AL., COMMISSIONERS of the Freedman's Saving and Trust Company, complainant,
vs.
HARVEY KENNEDY, EXECUTOR, ET AL., DEF. } No. 4209. Equity.

The demurrer of Harvey Kennedy, executor of the last will of James C. Kennedy, deceased; Julia R. Kennedy, Ezra T. Kennedy, Lauren O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin Kennedy, and William L. Kennedy, defendants named in the above-entitled cause, to the bill of complaint therein filed by the above-mentioned complainants.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's
14 bill to be true, in the manner and form in which the same are therein alleged, do demur thereto, and for cause of demurrer show—

1. That the said complainants are not entitled by law to sue in their own names or as commissioners for the choses in action of the above named Freedman's Savings and Trust Company.

2. That the complainants have not alleged in their said bill that they have duly proved their claim in the probate court of this district, and exhibited the same to the aforesaid executor, as required by law.

3. That the complainants have not, in and by their said bill, stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought from or against these defendants.

Wherefore these defendants pray the judgment of this court whether they should be compelled to make any further or other answer to the said bill, and that they be hence dismissed with their costs.

15 R. T. MERRICK,
M. F. MORRIS,
Solicitors & of Counsel for Defendants here named.

We do hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

MERRICK & MORRIS,
Of Counsel for Defendants.

STATE OF NEW YORK,
City & County of New York:

I do solemnly swear that the foregoing demurrer interposed on behalf of the defendants named in the above-entitled cause is not interposed for delay.

HARVEY KENNEDY.

Subscribed & sworn to before me this 24th day of April, A. D. 1875.

L. G. GARRETTSON,
Notary Public, N. Y. County.

16 *Cresswel et al. vs. Kennedy, ex'r, et al. Order overruling demurrer with leave to answer.—Filed July 21st, 1875.—R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL.
vs.
HARVEY KENNEDY, EX'R, ET AL. } 4209. Eq.

This cause having come on to be heard on the demurrer of the defendants, and having been *agreed* by counsel and considered by the court, it is, this 21st day of July, 1875, ordered, adjudged and decreed that the said demurrer be and the same is hereby overruled.

It is further ordered that said defendants have leave to answer said bill, and that they shall file their answer or answers within 30 days from this date.

A. W.

By the *county*.

17 *Freedman's Savings & Trust Co. vs. Harvey Kennedy et al.—Petition of E. M. Lewis, trustee.—Filed July 24th, 1875.—R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL, ROBERT PURVIS and Robert H. T. Leipold, commissioners of The Freedman's Savings and Trust Company, plaintiffs,
vs.
HARVEY KENNEDY, EXECUTOR OF THE LAST will of James C. Kennedy, deceased, Julia R. Kennedy, Ezra T. Kennedy, Laura O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin K. Kennedy, William S. Kennedy, and Abijail Kennedy, William H. Ward, Fanny Eames, Issabella Eaton, Paul Eaton, defendants. } Equity.

The petition of Edwin M. Lewis, trustee of the estate and effects of Jay Cooke, William G. Moorehead, Harris C. Fahnestock, Henry D. Cooke, Pitt Cooke, George C. Thomas, James A. Garland and
18 Jay Cooke, junior, co-partners, trading under the firm-name of Jay Cooke & Co., bankrupts, respectfully shows;

That he is the trustee as aforesaid, having been duly nominated, appointed, and confirmed as such trustee in the district court of the United States for the eastern district of Pennsylvania, according to law.

That James C. Kennedy in his lifetime heretofore, and before the said Jay Cooke & Co. became bankrupts, to wit, on the 25th day of July, 1872, by his promissory note now overdue, promised to pay to the order of himself $3,500 on demand, with interest at 9 per cent. per annum for value received, and the said James C. Kennedy, the payee, afterwards, to wit, on the day and year aforesaid, and before said Jay Cooke & Co. became bankrupts, endorsed and delivered said note to said Jay
19 Cooke & Co., and the said note was duly presented for payment and was dishonored, whereof said endorser had due notice, by means whereof the said James C. Kennedy in his lifetime became liable

to pay to said Jay Cooke & Co. the sum of money in the said note specified, according to the tenor and effect thereof; and being so liable the said James C. Kennedy in his lifetime, in consideration thereof, afterwards, and before said Jay Cooke & Co. became bankrupts, undertook and faithfully promised the said Jay Cooke & Co. to pay them the sum of money in the said note specified according to the tenor and effect thereof when he should be thereunto requested.

Nevertheless the said James C. Kennedy in his lifetime, and the said Harvey Kennedy, executor as aforesaid, since the death of the said James C. Kennedy, though often requested, did not, nor did either of them, pay the said sum of $3,500, or any part thereof, to the said
20 Jay Cooke & Co. before they became bankrupts, nor have they either of them paid the same, or any part thereof, though often requested so to do, to your petitioner since the said Jay Cooke & Co. became bankrupts; and there is now justly due and owing from the said Harvey Kennedy, as the executor as aforesaid, to your petitioner the sum of $3,500, with interest thereon at the rate of 9 per cent. per annum till paid from the 31st day of September, 1872.

Your petitioner further shows that the claim herein set forth has been duly authenticated and passed by the September court of the District of Columbia holding an orphans' court as a claim against the estate of the said James C. Kennedy, deceased, and was also exhibited to said executor for allowance or payment, but he disputed said claim and has refused and still refuses to allow the same.

Your petitioner further shows that he is informed and believes
21 that the facts stated in the bill of complaint filed in this cause are true.

Your petitioner therefore prays that he may be made a party plaintiff in this cause, and allowed to prosecute the same.

DAVIDGE & FENDALL,
Attorneys for the Pl'ff.

Freedman's Sav. & T. Co. H. Kennedy et al.—Issued July 24th, 1875; returned 26, 1875.—Merrick & Morris.—Subpœna to answer Lewis petition.

In the supreme court of the District of Columbia, the 24th day of July, 1875.

Subpœna to answer.

JOHN A. J. CRESSWELL, ROBERT PURVIS, Robert H. J. Leipold, commissioners Freedman's Savings & Trust complainant, *against* HARVEY KENNEDY, EXECUTOR & DEFENDANT. } No. 4209. Eq'y doc. 14.

The President of the United States to Harvey Kennedy, executor of J. C. Kennedy, dec., Julia R. Kennedy, Ezra T. Kennedy, Lauren
22 O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin R. Kennedy, Wm. S. Kennedy, Abigail Kennedy, William H. Ward, Fanny Eames, Isabella Eaton, Paul Eaton, defendants.

You are hereby commanded to appear in this court at its first special term occurring twenty days after service of this subpœna and answer the exigency of the petition this day filed and entitled as above, under

pain of attachment and such other process of contempt as the court shall award.

Witness:

D. K. Carter, chief justice.

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR., *Ass't Clerk.*

MEMORANDUM.—That the defendant herewith served are to enter their appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken for confessed.

Return of marshal upon s'p'a to answer.

Summoned Mr. Morris, of the firm of Merrick and Morris, July 26, 1875.

A. SHARP, *Marshal.*

23 *Cresswell et al., com., vs. W. Kennedy et al., def.—Plea of defendants.—Merrick & Morris for def'ndt's.—Filed Sept. 9th, 1875.—R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL, ROBERT PURVIS, AND Robert H. F. Leipold, commissioners of the Freedman's Savings and Trust Company, complainants,
vs.
HARVEY KENNEDY, EXECUTOR OF THE ESTATE of James C. Kennedy, Julia R. Kennedy, Ezra T. Kennedy, Laura O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin R. Kennedy, William L. Kennedy, and Abigail Kennedy, and William H. Ward, Fanny Evans, Isabella Eaton, and Paul Eaton, defendants. } No. 4209. Equity.

The plea of the above-named defendants, Harvey Kennedy, executor of the last will of James C. Kennedy, deceased, Julia R. Kennedy,
24 Ezra T. Kennedy, Lauren O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin R. Kennedy, and William L. Kennedy, to the bill of complaint of the above-named complainants filed against them in this cause.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true as therein alleged, for plea to the whole of said bill say:

That the executor aforesaid has in his hands assets of the estate of the said James C. Kennedy, deceased, amply sufficient to pay and discharge the claims of the complainants and all other claims that have been brought to his notice, and that he is ready and willing to pay the said claim of the complainants whenever and as soon as the same shall have been proved and established by a tribunal of competent juris-
25 diction according to law; but the said executor disputes the said claim and denies the justice and validity thereof, and has for such cause rejected the same; and the said complainants have not

sought in any manner to enforce their said claim against the said executor and the assets in his hands by proper proceedings at law:

Wherefore, these defendants aver and plead the premises in bar of *of* the complainants' bill, and they pray that the complainants be required to enforce their claim against the said executor by proper proceedings at law, and they pray also the judgment of the court whether they, these (defendants), should be compelled to make any further or other answer to the said bill, and that they be hence dismissed with their reasonable costs in this behalf wrongfully sustained.

HARVEY KENNEDY,
For himself and other defendants herein named.

MERRICK & MORRIS,
Sol's & of Counsel for said Def.

26 We do hereby certify that, in our opinion, the foregoing plea is well founded in point of law.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Defendants.

I do solemnly swear that the foregoing plea, signed by me, is not interposed for delay, and that it is true in point of fact.

HARVEY KENNEDY.

Subscribed and sworn to before me this 7th day of September, A. D. 1875.

GEORGE W. ELY,
Notary Public, Kings Co.

Ct'f. filed in New York.

27 STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that George W. Ely has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was, at the time of taking the annexed, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 7th day of Sept. 1875.

WM. WALSH, *Clerk.*

28 *John A. J. Creswell et al. vs. Harvey Kennedy et al.—Demurrer of defendants.—Merrick & Morris for defendants.—Filed Sep. 9th, 1875.—R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESSWELL ET AL., COMPLAINANTS,
vs.
HARVEY KENNEDY ET AL., DEFENDANTS. } No. 4209. Equity.

The demurrer of the defendants, Harvey Kennedy, executor of the last will and testament of James C. Kennedy, deceased, Julia R. Kennedy, Ezra T. Kennedy, Lauren O. Kennedy, Harvey Kennedy, Lucinda Stewart, Martin R. Kennedy, and William L. Kennedy, to the petition of Edwin M. Lewis, trustee of the estate of Jay Cooke and Company, bankrupts, filed in the above-entitled cause.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said petition contained to be true as therein alleged, do demur thereto; and for cause of de-
29 murrer they show:

1. That the petitioner hath not, in and by his said petition, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought against these defendants.

2. That it does not appear in said petition that said petitioner has obtained any judgment at law against the said executor, or has established his claim as required by law.

3. That the petitioner has not established his claim against the said executor by a judgment at law, as was his duty, before invoking the aid of a cou't of equity; forasmuch as the petitioner's claim remains unpaid, because the said executor disputed the justice and validity thereof, and for that reason rejected the same, and for no insufficiency of assets; and no such insufficiency of assets is alleged by the petitioner.

30 4. That the petitioner has not sworn to his said petition, and such petition was therefore improperly and irregularly filed, and should be stricken from the files of the court.

Wherefore these defendants pray the judgment of the court whether they should be required to make any further or other answer to said petition, and that they be hence dismissed with their costs in this behalf sustained.

HARVEY KENNEDY,
For himself and the other Defendants hereinbefore named.

MERRICK & MORRIS,
Sol'rs & of Counsel for Defendants.

We do hereby certify that, in our opinion, the foregoing demurrer is well founded in point of law.

MERRICK & MORRIS,
Of Counsel for Defendants.

31 I do solemnly swear that the foregoing demurrer is not interposed for delay.

HARVEY KENNEDY.

Subscribed and sworn to before me this 7th day of September, A. D. 1875.

GEORGE W. ELY,
Notary Public, Kings Co., c'f. filed in New York.

32 STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify that George W. Ely has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was, at the time of taking the annexed, duly au-

thorized to take the same, and that I am well acquainted with the handwriting of said notary public, and verily believe that the signature to the annexed certificate is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 7th day of Sept., 1875.

WM. WALSH, *Clerk.*

33 *F. S. & T. Co.* *Harvey Kennedy, ex'r, oe. & others.—Rep'ns to plea.—Filed Jan. 17th, 1876.—R. J. Meigs.*

Supreme court of the District of Columbia.

COM'RS F. S. TRUST CO., *vs.* HARVEY KENNEDY ET. AL. } 4209.

The said plaintiffs, for replication to the plea of the said defendants, say that the said claim of the plaintiffs is just and valid, and joins issue with said defendants on the said plea.

ENOCH TOTTEN,
Sol'r for Complainant.

34 *Creswell et al.* *Harvey Kennedy, executor.—Deposition of George W. Stickney in behalf compl't, handed 5th day Apr'l, 1876, to clerk supreme court D. C. for file with Exh't 2 & 3.—Filed Apr. 5, 1876.*

In the supreme court of the District of Columbia.

CRESWELL ET AL., COM'N'RS, *vs.* HARVEY KENNEDY, EXECUTOR. } Equity No. 4209.

DISTRICT OF COLUMBIA,
County of Washington, ss :

Be it remembered, that at an examination of witnesses begun and held on the 4th day of April, 1876, & concluded that day, when the within deposition was taken, I, Frank S. Browning, examiner in chancery, did cause to be personally present at the office of Enoch Totten, Washington, D. C., George W. Stickney, to testify on the part and behalf of plaintiffs in a certain cause now pending in the supreme court of the District of Columbia, wherein John A. J. Creswell and others are complainants, and Harvey Kennedy, executor, et al., are defendants.

FRANK S. BROWNING,
Ex'r in Chancery.

35 In the supreme court of the District of Columbia.

FREEDMAN'S SAVINGS AND TRUST COMPANY *vs.* KENNEDY ET AL. } Equity. No. 4207.

APRIL 4TH, 1876.

Met pursuant to an agreement between counsel.
Present, counsel for both sides & one witness.

GEORGE W. STICKNEY, a witness of lawful age, being first duly sworn in behalf of the plaintiffs, deposes and says.

I was acquainted with James C. Kennedy, one of the defendants in

the above entitled cause. In 1872 I was assistant actuary of the Freedman's Savings & Trust Company. I was present at the time the note of
36 $12,000.00, bearing date March 27, 1872, and made by James C. Kennedy, and here shown to the witness, with the probate thereto attached; I saw Mr. James C. Kennedy sign the said note.

(Mr. Morris here objects to the note's being introduced in evidence, as it is not pertinant to the issue now raised.)

I presented the note to Mr. James G. Berret, also to Mr. Harvey Kennedy, the executor, soon after Mr. Harvey Kennedy was appointed executor. None of the notes had been paid to the Freedman's Savings & Trust Company as far as I know. None of it was paid while I was connected with the Freedman's Savings and Trust Company or the commissioners of said company. I left the employment of the commissioners May 1st, 1875. Mr. Barrett was the attorney for the executor, I understood, and Mr. Harvey Kennedy always referred me to him in relation to any loans to the bank. When the commissioners took charge of the company, I, as actuary of the company, turned this note over as part of the assets.

37 (Mr. Morris objects to the foregoing testimony.)

Counsel for the defendant desires to be understood as cross-examining the witness under protest, as the testimony is not pertinent to the issue.

Q. What collateral security, if any, was given with the note?

A. $20,000.00 second mortgage bond of the Maryland Freestone Mining and Manufacturing Company of Montgomery County, Maryland.

Q. What has become of it?

A. On deposit with the commissioners of the Freedman's Savings and Trust Company.

Q. Do you know what the money was used for that Mr. Kennedy raised upon that note?

A. No, sir.

Q. Do you remember whether or not Mr. Henry D. Cook appeared in this transaction?

A. He did not.

GEORGE W. STICKNEY.

38 The complainants' counsel now offered in testimony certified copies of the exceptions filed by the complainants in this cause to the inventory of Harvey Kennedy, executor, in the office of register of wills on the 17th day of November, 1874, and the same is marked Exhibit No. 1 and filed herewith.

He also offers in evidence a certified copy of the first accounts of said Harvey Kennedy, executor, filed by him in the office of the register of wills, and the same is marked Complainants' Exhibit No. 2, and filed herewith.

He also offers in evidence the inventory of the assets of the estate returned by said Harvey Kennedy to the supreme court of the District of Columbia, holding probate court, & sworn to by said Harvey Kennedy October 16th, 1874, and the same is marked Complainants' Exhibit No. 3, and herewith filed.

It is stipulated by counsel that the copies of the said exhibits
39 made by the register of the wills of the District of Columbia may be used at the hearing of this cause with the same force and effect as the originals might be if produced.

It is also stipulated that the copy of the promissory note and of the probate thereto attached, which is annexed to & forms a part of the

Complainants' Exhibit No. 1, may be read in evidence at the hearing with the same force & effect as the originals.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Frank S. Browning, examiner in chancery, do hereby certify that in pursuance of a notice given, the foregoing deposition was taken down and by me reduced to writing, in the presence of, and from the statements of the witness, at the time and place designated in the caption thereof, and was then and there read over by the witness and by him subscribed in my presence. The witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

FRANK S. BROWNING,
Examiner in Chancery.

F. S. & T. Co. Com'rs, vs. Harvey Kennedy, ex'r estate James C. Kennedy et al.—Decree for an ac., and referring cause to auditor. —Filed Apr. 5th, 1876.—R. J. Meigs.

In the supreme court of the District of Columbia.

JOHN A. J. CRESWELL ET AL.
vs.
HARVEY KENNEDY, EX'R, &C., ET AL. } Eq. No. 4209.

This cause having come on in its regular order for hearing on the bill , and depositions, and Mr. Totten having been heard for the complainants, and Mr. Morris for the defendants, it is upon consideration, this 5th day of April, A. D. 1876, ordered, adjudged and decreed that an account be taken between the deceased and all his creditors, and that the cause be referred to the auditor of this court for that purpose.

It is further ordered that the said auditor cause the creditors of the estate of James C. Kennedy, deceased, by one public notice, to come before him to prove their debts, at the City Hall in the city of Washington within ten days from the date of said public notice, and the said auditor shall take an account of all the personal estate of the deceased in the hands of the said Harvey Kennedy, executor, in order that the same may be applied in payment of the debts and other charges against the estate of said deceased.

It is further ordered, adjudged and decreed that the cause stand over for further order and decree upon the coming in of the report of the auditor.

By the court.

A. W.

Order for appeal.—Filed April 6, 1876.

Order to enter appeal.

The defendants appeal to the general term from the decree pronounced against them at the special term on the 5th day of April, 1876.

MERRICK & MORRIS,
Sol'rs for Def'ts.

Appeal entered as per precipe.
By the clerk.

Creswell et al., comp., vs. Kennedy et al., defend.—Appeal-bond—Filed Apr. 24th, 1876.—R. J. Meigs.

In the supreme court of the District of Columbia.

CRESSWELL ET AL., COMPLAINANTS,
vs.
H. KENNEDY ET AL., DEFENDANTS. } No. 4209. Equity.

The defendant, Harvey Kennedy, having appealed to the general term from the decree pronounced against him by the special term on
44 the 6th day of April, A. D. 1876, and James G. Berret, his surety, for themselves, and each of them, and each of their heirs, executors, and administrators, appearing and submitting to the jurisdiction of the said general term, hereby undertake to pay the costs of such appeal, for which they agree that judgment may be rendered against each and all of them.

HARVEY KENNEDY.
JAMES G. BERRET.

Approved:

A. WYLIE.

Cause remanded to special term.—Filed Nov. 24th, 1876.

Order in general term.

F. S. & T. Co.
vs.
KENNEDY ET AL. } 4209. Eq. doc., 17.

The court orders that this cause be remanded to the special term for such further proceedings in it as may seem right and proper to the court there.

Nov. 24th, 1876.

45 *Creswell et al. vs. Harvey Kennedy et al.—Decree for payment of specified sum against Harvey Kennedy.—Filed Dec. 21st, 1876.—R. J. Meigs.*

In the supreme court of the District of Columbia.

JOHN A. J. CRESWELL ET AL., COM'RS
F. S. & T. Co.,
vs.
HARVEY KENNEDY, EX'R, ET AL. } Equity. No. 4209.

This cause having come on to be heard on the pleadings and evidence, and having been argued by counsel in behalf of the commissioners of the Freedman's Savings and Trust Company, and by the counsel for the defendants, and it appearing to the satisfaction of the court from the evidence that the debt, as claimed in the said bill, is justly due from the estate of the said James C. Kennedy to the said complainants, and it also appearing from the plea of the said Harvey Kennedy that he has in his hands, as executor of the last will and testament of the said
46 James C. Kennedy, deceased, assets amply sufficient to pay all claims against the said estate, it is therefore, this 21st day of

December, 1876, ordered, adjudged, and decreed that the said complainants, John A. J. Creswell, Robert Purvis, and Robert H. T. Leipold, commissioners of the Freedman's Savings and Trust Company, have and recover of and from the said defendant, Harvey Kennedy, the sum of twelve thousand dollars ($12,000), with interest thereon at the rate of ten per centum per annum from March 27th, 1872, until the 22d day of July, 1873, and with interest thereon from July 22d, 1873, until paid, at the rate of six per centum per annum.

And it is further ordered, adjudged, and decreed that the said defendant Harvey Kennedy forthwith pay unto the said John A. J. Creswell, Robert Purvis, and Robert H. T. Leipold, commissioners as aforesaid, or their solicitor, the said sum of money with interest as aforesaid, together with the costs of this suit to be taxed by the clerk.

47 It is further decreed that this cause be retained for further proceedings in behalf of the other creditors, and from this decree the defendants, in open court, pray an appeal to the court in general term.

By the court.

A. W.

Appeal bond to general term.

Know all men by these presents that we, Harvey Kennedy, executor of the estate of James C. Kennedy, deceased, as principal, and James G. Berret as surety, are held and firmly bound unto John A. J. Cresswell, R. H. T. Leipold, and Robert Purvis, commissioners of the Freedman's Savings and Trust , in the sum of five hundred dollars in lawful money of the United States, to be paid to the said commissioners, or their successors in office, or their lawful attorneys, to which payment, well and truly to be made, we bind ourselves, our executors, and

48 administrators, jointly and severally by these presents, sealed with our seals, and dated this 27th day of December, A. D. 1876.

Whereas the above bounden Harvey Kennedy, executor as aforesaid, has appealed to the general term of the supreme court of the District of Columbia, from a decree entered against him in the special term of said court on the 21st day of December, A. D. 1876, in a proceeding known as number 4209 on the equity docket of said court, wherein the said commissioners are complainants and the said executor and others are defendants.

Now, the condition of this obligation is such, that if the said Harvey Kennedy, executor as aforesaid, shall make good his appeal, and the said decree shall be reversed by said general term, or failing therein, the said executor shall pay all costs and damages resulting to said complainants from his appeal, then this bond shall be void, otherwise to remain in full force and effect.

HARVEY KENNEDY, *Exec'r.* [SEAL.]
JAMES G. BERRET. [SEAL.]

Approved:

A. WYLIE.

49 *F. S. & T. Co. vs. Harvey Kennedy, ex., et al.—Decree of general term (3 M. G. T. 99-100).—Filed June 26th 1877.—R. J. Meigs, clerk.*

In the supreme court of the District of Columbia, in general term, June, 1877.

THE FREEDMAN'S SAVINGS & TRUST COMPANY
vs.
HARVEY KENNEDY, EX., ET AL. } Equity. No. 4209.

This cause having come on to be heard on the appeal of the defendants from the decree made by the special term therein, and having been argued by counsel on both sides, it is, this 26th day of June, 1877, ordered, adjudged, and decreed that the decree made in this cause in the special term be and the same is hereby, in all things, ratified and affirmed at the cost of the said Harvey Kennedy, executor; from which decree the said Harney Kennedy, executor, prays an appeal to the Supreme Court of the United States; which is allowed.

By the court.

A. W.

50 *Creswell et al., com'rs Freedman's Sav. & Trust Co., vs. Harvey Kennedy et al.—Bond for appeal to Supreme Court of the U. S.—Filed July 7th, 1877.—R. J. Meigs, clerk.*

Know all men by these presents that the undersigned, Harvey Kennedy, executor of the last will and testament of James C. Kennedy, deceased, and James G. Berret, of the city of Washington, in the District of Columbia, his surety, are held and firmly bound unto John A. J. Cresswell, Robert H. T. Leipold, and Charles B. Purvis, commissioners of the Freedman's Savings and Trust Company, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Cresswell, Leipold, and Purvis, commissioners as aforesaid, or their successors lawfully appointed, or their assigns, for which payment, well and truly to be made, they jointly and severally bind themselves, their heirs, executors, administrators, and assigns, by these presents, sealed with their seals, and dated this 27th day of June, A. D. 1877.

The condition of this obligation is such that whereas the above
51 named Harvey Kennedy, executor as aforesaid, has prayed and been allowed an appeal to the Supreme Court of the United States from the decree rendered against him in the supreme court of the District of Columbia, in cause No. 4209, on the equity docket of said supreme court of the District of Columbia, wherein the aforesaid commissioners are complainants and the said Harvey Kennedy, executor as aforesaid, and others are defendants.

Now, therefore, if the said Harvey Kennedy, executor as aforesaid, shall prosecute his said appeal to effect, or failing to make good his said appeal, shall answer all damages and costs in the premises and shall pay the amount decreed against him in the aforesaid decree, with interest and costs, then this obligation is to be void; otherwise, the same shall be and remain in full force and effect.

HARVEY KENNEDY, [SEAL.]
Executor, &c.
JAMES G. BERRET. [SEAL.]

Approved.

A. WYLIE.

52 STATE OF NEW YORK,
County of New York, ss:

On this 29th day of June, 1877, before me personally came Harvey Kennedy, executor, known to me to be one of the individuals described in and who executed the above instrument and acknowledged that he executed the same.

[NOTARY SEAL.] T. H. NAIRNE,
Notary Public, # 9, New York County.

STATE OF NEW YORK,
City and County of New York, ss:

I, Henry A. Gumbleton, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that T. H. Nairne, whose name is subscribed to the certificate of the proof or acknowledg-
53 ment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court and county, the 29th day of June, 1877.

[L. S.] HENRY A. GUMBLETON,
Clerk.

54 *Authentication of record.—Clerk's certificate.*

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 11 day of October, 1877.

SEAL.] R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 11 day of Oct. 1877.

[SEAL.] D. K. CARTTER,
Chief Justice.

Clerk's certificate to justice's official character.

I, , clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing cer-

tificate, was, at the time of signing and attesting the same, chief justice of said court duly commissioned and qualified.

Witness my hand and the seal of said court this 11 day of October, 1877.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

(Indorsement on cover:) No. 277. Harvey Kennedy, executor of James C. Kennedy, deceased, appellant, vs. John A. J. Cresswell, Robert H. T. Leipold, and Robert Purvis, commissioners of the Freedman's Savings and Trust Company. Dist. of Col. sup. court. Filed 12th October, 1877.

REC. 277—2

SUPREME COURT OF THE UNITED STATES.

No. 277.—October Term, 1879.

HARVEY KENNEDY, EXR., APPELLANT,

vs.

JOHN A. J. CRESWELL ET AL., APPELLEES.

ADDITIONAL RECORD.

FILED APRIL 1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1879.

HARVEY KENNEDY, EXR., APPELLANT,
vs.
JOHN A. J. CRESWELL ET AL., APPELLEES. } No. 277.

ADDITIONAL RECORD.

It is hereby stipulated and agreed that annexed documents, marked Complainants' Exhibits, No. 1, No. 2, and No. 3, shall be read and considered as a part of the original record in this cause at the hearing thereof, the same having been omitted by accident or mistake in copying the said record in the court below, these documents constituting a part of the record in said court.

April 16, 1880.

ENOCH TOTTEN,
For Appellees.
MERRICK & MORRIS,
For Appellant.

Authentication of Record.— Clerk's Certificate.

Clerk's Office, Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the Exhibits Nos. 1, 2, and 3 to complainants' testimony filed therein and omitted from the record of the proceedings of said court in this cause, which was transmitted to the Supreme Court of the United States.

Witness my hand and the seal of said court, this 16th day of April, 1880.

[SEAL.]

R. J. MEIGS, *Clerk.*
By R. J. MEIGS, JR., *Assistant Clerk.*

Complainants' Exhibit, No. 1.

In the Supreme Court of the District of Columbia, holding a special term for probate business.

IN THE MATTER OF THE ESTATE OF
JAMES C. KENNEDY, DECEASED.

And now comes John A. J. Creswell, Robert Purvis, and Robert H. D. Leipold, commissioners of the Freedman's Savings and Trust Company, of the District of Columbia, and except to the inventory, and first account filed by Harvey Kennedy, executor of said estate, for the reasons following, to wit:

First. The said inventory does not contain a true statement of the assets belonging to the said estate, in this, that it does not show the debts due to the said estate.

Second. The said first account exhibits unlawful preference in that it pays in full certain creditors therein named, while it shows but a small balance remaining on hand to pay other creditors. That the Freedman's Savings and Trust Company is the owner and holder of a promissory note, made by the said James C. Kennedy, and dated March 27th, 1872, payable to his own order on demand, for $12,000.00, with interest at ten per centum per annum. Payment of the said note was long ago demanded, but no part thereof has ever been paid, and the whole of said note, with interest, is due from the said estate to the said commissioners of the Freedman's Savings and Trust Company. The said executor was duly notified long before the payments were made, as set forth in his said account, that the said Trust Company so owned and held the said note against the said estate.

ENOCH TOTTEN,
Atty. for Comrs. F. S. & T. Co.

A true copy. Test:
[SEAL.] A. WEBSTER, *Register of Wills.*

$12,000.00. WASHINGTON, D. C., *March 27th*, 1872.

On demand, after date, I promise to pay to the order of myself, twelve thousand dollars, at the banking-house of Jay Cooke & Co. Value received, with int. at ten per cent.

JAMES C. KENNEDY.

Supreme Court of the District of Columbia, holding a special term, June 1st, 1874.

DISTRICT OF COLUMBIA, } *to wit:*
WASHINGTON COUNTY. }

This day appeared John H. Cooke, solicitor of the F. S. & T. Company, and made oath on the Holy Evangels of Almighty God, that no part of the money intended to be secured by the annexed note has been received, or satisfaction given for the same.

Test: A. WEBSTER,
Register of Wills.

Approved and passed by the court, June 9th, 1874.

Test: A. WEBSTER,
Register of Wills.

A true copy. Test:
[SEAL.] A. WEBSTER, *Register of Wills.*

Complainants' Exhibit, No. 2.

First account of Harvey Kennedy, Executor of James C. Kennedy, deceased.

This accountant charges himself with the amount of the inventory, as follows:

Household and kitchen furniture, &c.....	$4,598 50	$4,598 50
5 shares Md. Freestone Mining and Mff. Company—"Seneca".....	100 00	100 00
139 shares of stock of Atlantic Co. R. R. of Brooklyn, N. Y.....	5,000 00	5,000 00
$6,700 bonds of Brooklyn & Jamaica R. R. —4th mortgage.....	5,000 00	5,000 00
$17,000 1st mortgage bonds Adirondack R. R. Company.....	8,500 00	8,500 00
1 gold watch.....	225 00	225 00
50 shares (½ paid in) of the Arlington Fire Insurance Co. stock.....	2,200 00	
Sold for.....		2,475 00
	$25,623 50	
Amount forward.....		$25,898 50
Amount forward.....		$25,898 50

He further charges himself with the following collections on account of the personal estate of said deceased, to wit:

1873.			
June 28.	W. N. Clarke's check of Mch. 6, '73, account ins. damage by fire at Johnstown, N. Y.....	$85 60	
"	Geo. Cuyler's check of Mch. 24, '73, account of same damages...	24 40	
"	S. N. Solomon, on account.....	890 00	
July 3.	Cash account of int. on $6,700 B. & J. R. R. bonds.....	234 50	
	Dividend on 12 shares B. H. of Richmond stock.....	60 00	1,294 50
July 8.	Cash from sale of 1 roan horse, not appraised.....	300 00	
"	Cash from sale of 1 set double harness.....	70 00	
"	Cash from sale of 1 pr. blankets and hoods.....	30 00	400 00
"	Cash from sale of horse and coupe harness.....	100 00	
Aug. 14.	Cash from sale of 12 shs. Bk. of Richmond stk., not appraised....	1,425 00	
Sept. 2.	Cash from sale of phaeton and harness, net.....	273 05	

1874.			
Jany. 2.	Cash account of coupons, $6,700 B. & J. R. R. bonds	234 50	
			2,032 55
Feb. 19.	Cash from sale of wine, not appraised	57 47	
Mch. 6.	Cash from Comptroller of Currency on account of J. C. Kennedy's receivership Merchants' Natl. Bank	1,188 20	
May 14.	Cash from Hyde and Bestor, trustees	525 35	
July 15.	Cash from S. N. Solomon, on account	153 05	
"	Cash from same, ½ referee's fees	10 50	
			1,934 57
July 1.	Cash on account coupons, B. & J. R. R. bonds	234 50	234 50
	Amount forward		$31,794 62

Amount forward.....$31,794.62.

He claimed credit and allowance for the following, to wit:

By paid	John T. Metcalfe, M. D.,	vou. 1...	550 00	
	Dr. David P. Smith	2...	27 00	
	L. Marcotte & Co	3...	80 73	
	Madam Daedy	4...	8 28	
				666 01
	Tiffany & Co	5...	147 05	
	Dr. J. C. Hall	6...	15 00	
	" W. L. Thompson	7...	3 05	
	John M. Dermott	8...	5 10	
				170 20
	Perry & Bro	9...	219 11	
	Beckwith & Huntly	10...	72 11	
	James & Collins	11...	187 61	
	T. W. Hilleary	12...	190 68	
				669 51
	Richard B. Mohun	13...	95 10	
	John Ogden	14...	77 89	
	H. D. Gettier	15...	48 40	
	Francis Lamb	16...	17 75	
				239 14
	Amounts forward, $31,794.62			$1,744 86

Amount forward, $31,794.62				$1,744 86
Laure & Saile	17...	151 62		
Walker Hawks	18...	20 65		
Edmund Cammack	19...	128 70		
F. O'Neal	20...	21 00		
				321 97
John Douglass.	21...	400 00		
George Wagner	22...	10 00		
J. Becker	23...	100 00		
R. T. Merrick, esq.	24...	1,000 00		
				1,510 00
Chas. G. Ball	25...	17 75		
E. G. Davis	26...	25 75		
Dr. G. W. Pope	27...	75 00		
Ida M. Demonet	28...	119 07		
				237 57
Dickson & King	29...	447 68		
Geo. Huntley & Co.	30...	510 93		
Thomas C. Wilson	31...	919 15		
Webb & Beveridge	32...	71 49		
				1,949 25
N. W. Burchell	33...	370 23		
Wm. Whelan	34...	8 00		
James B. Dodson	35...	7 00		
Jerry Crowley	36...	74 00		
L. F. Clark	37...	13 72		
				472 95
Amounts forward, $31,794.62				$6,236 60
Amounts forward, $31,794.62				$6,236 60
By paid John F. Ellis vou.	38...	82 50		
Wall, Robinson & Co.	39...	60 00		
M. Tebbutt	40...	64 96		
W. J. Daniels	41...	69 50		
				276 96
Dr. W. P. Johnston	42...	70 00		
Epiphany Church Home.	43...	31 86		
F. Crooks	44...	22 25		
Madam Galoupean	45...	11 00		
				135 11
Arnold, Constable & Co.	46...	118 25		
Thomas C. Wilson	47...	170 37		
Register of Wills	48...	12 63		
Keyes & Co.	49...	7 00		
				308 25
Albany Cem	50...	505 00		

Thos. C. Wilson's note...	51...	1,015 72	
Mrs. M. A. Ross.....	52...	37 75	
B. W. Reed & Sons.....	53...	1 80	
			1,560 27
Barney Manning.....	54...	728 32	
G. L. Gatchet.....	55...	58 00	
Jerry Crowley.....	56...	50 00	
F. Charbonnet.....	57...	2 00	
			838 32
Walter Williams.....	58...	11 25	
R. F. Harvey	59...	270 00	
Amounts forward, $31,794.62...		$281 25	$9,355 51
Amounts forward, $31,794.62...		$281 25	$9,355 51
Note to Sidney V. Mitchell	60...	3,105 00	
Mrs. E. Lowe.....	61...	30 56	
			3,416 81
T. Roessle & Son.....	62...	211 47	
F. S. D. Co., int. on note.	63...	500 00	
M. William's note and int.	64...		
J. M. J. Lanno, int. on mort.	65...	1,918 40	
Same.....do.	66...	200 00	
			2,829 87
Same.....do.	67...	200 00	
Same.....do.	68...	200 00	
Same.....do.	69...	200 00	
Same.....do.	70...	200 00	
			1,000 00
Mrs. H. P. Metcalfe...do.	71...	500 00	
Same.....do.	72...	200 00	
Same.....do.	73...	350 00	
Same.....do.	74...	350 00	
			1,400 00
Miss M. S. Worth....do.	75...	1,000 00	
Same.....do.	76...	500 00	
Same.....do.	77...	500 00	
Same.....do.	78...	500 00	
Same.....do.	79...	500 00	
			3,000 00
F. S. & T. Co.....do.	80...		1,000 00
Amounts forward, $31,794.62.....			$22,002 19

Amounts forward, $31,794.62				$22,002 19
By paid Mrs. H. Kennedy, int. on note	vou. 80...	$500 00		
Same	do. 81...	$500 00		
Same	do. 82...	500 00		
			1,500 00	
	83...	700 00		
	84...	350 00		
	85...	350 00	1,400 00	
By paid Register of Wills	83...	10 00		
do.	87...	35 82		
			45 82	
By commission on $31,794.62 @ 6½ per cent.			2,066 74	
By household and kitchen furniture on hand @		4,598 50		
By 5 shs. Md. Freestone Mining and Mff. Company stock on hand @		100 00		
By 139 shs. of stock of Atlantic Av. R. R. of Brooklyn, N. Y., do. @		5,000 00		
By $6,700 bonds of Brooklyn and Jamaica R. R., 4th mortgage, do. @		5,000 00		
By $17,000 1st mortgage bonds of Adirondack R. R. Co., do. @		8,500 00		
By 1 gold watch do. @		225 00		
			23,423 50	
	$31,794 62		$50,438 25	
Cash credits and payments over and above cash receipts	18,643 63			
	$50,438 25		$50,438 25	

STATE, CITY, AND COUNTY OF NEW YORK, *ss.*

Personally appeared before the subscriber, Harvey Kennedy, and made oath in due form of law that the aforegoing account as stated is just and true, and that he has bona fide paid or secured to be paid the several sums for which he claims credit and allowance. HARVEY KENNEDY, *Executor.*

Sworn to and subscribed before me, this 16th day of October, A. D. 1874. W. B. LAMBORN, [SEAL.]
Notary Public.

STATE OF NEW YORK, } *ss.*
COUNTY OF KINGS. }

I, George G. Herman, clerk of the county of Kings, and clerk of the Supreme Court of the State of New York, in and for said

county, (said court being a court of record,) do hereby certify that W. B. Lamborn, before whom the annexed deposition was taken, was at the time of taking the same a notary public of the State of New York in and for the said county, dwelling in said county, duly commissioned and sworn, and duly authorized to administer oaths for general purposes; and further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to said deposition to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court, this 16th day of Oct., 1874.

[SEAL.] GEORGE G. HERMAN, *Clerk*,

DISTRICT OF COLUMBIA, WASHINGTON COUNTY. } *to wit.* OFFICE OF REGISTER OF WILLS.

I hereby certify that the foregoing is a true copy from the original first account of Harvey Kennedy, executor of James C. Kennedy, deceased, filed and recorded in the office of Register of Wills for Washington County aforesaid.

Witness my hand and the seal of the Supreme Court of Washington County aforesaid, this 2d day of February, A. D. 1876.

[SEAL.] A. WEBSTER, *Register of Wills.*

Copy. *Exhibit No.* 3.

DISTRICT OF COLUMBIA, WASHINGTON COUNTY. } *to wit.*

The United States of America to David M. Wheeler and George E. Johnson, greeting :

This is to authorize you jointly to appraise the goods, chattels, and personal estate of James C. Kennedy, late of Washington County aforesaid, deceased, so far as they shall come to your sight and knowledge, each of you having first taken the prescribed form of oath, (or affirmation,) a certificate whereof you are to return, annexed to an inventory of the said goods, chattels, and personal estate by you appraised, in dollars and cents; and in the said inventory you are to set down, in a column or columns opposite to each article, the value thereof.

Witness A. B. Olin, esquire, Associate Justice of the Supreme Court of the District of Columbia, this 18th day of September, 1873. Test : A. WEBSTER,

[SEAL.] *Register of Wills.*

Complainants' Exhibit No. 3.

OFFICE OF REGISTER OF WILLS.

DISTRICT OF COLUMBIA, WASHINGTON COUNTY. } *ss.*

Personally came before me, Register of Wills in and for said county, David M. Wheeler and George E. Johnson, who upon

their solemn oaths did say that they will well and truly, without partiality or prejudice, value and appraise the goods, chattels, and personal estate of Jas. C. Kennedy, late of Washington County aforesaid, deceased, so far as they shall come to their sight and knowledge, and will in all respects perform their duty as appraisers to the best of their skill and judgment.

D. M. WHEELER.
GEO. E. JOHNSON.

Sworn and subscribed, this 19th day of September, 1873, before me.

A. WEBSTER,
Register of Wills.

Inventory of the goods, chattels, and personal estate of James C. Kennedy, late of Washington County aforesaid, deceased, taken and made by us, the subscribers, in conformity with the above deposition:

Office.

1 table mirror, $1; 2 easy chairs in green rep, $25.....	$26 00
1 folding chair, carpet seat, $12; 3 parlor chairs, striped rep, $9.....	21 00
1 carved chair, in green rep, $10; 1 round walnut table and 2 inkstands, $8.....	18 00
1 library table, walnut.....	15 00
1 library book-case, $15; cornice at windows, $10.....	25 00
1 high table, walnut, $12; 2 chandeliers (10 globes), $50.....	62 00

Wash-room.

1 soap dish and mirror, $1; 2 mats, $4.....	5 00

Hall

3 mats, $2; 2 chairs in green reps, $6.....	8 00
Large hat-rack, mirror back, $50; 4 pictures, $12.....	62 00
1 chandelier (3 globes), $3; 2 brackets (1 globe each), $3.....	6 00

Billiard-room.

1 billiard table and cover, $250; 1 stand and cues, $20,	270 00
Billiard marker, $2; 5 billiard balls, $10.....	12 00
3 chairs in rep, $12; the chandelier, 8 globes, and 2 shades, $45.....	57 00
1 mantel mirror and 2 screens, $25; 4 pictures and 4 shades, $35.....	60 00
3 brackets (5 globes).....	5 00
Amt. for'd.....	$652 00

Amt. for'd	$652 00
Dining-room.	
1 extension table, 6 leaves, $40; marble-top sideboard, $125	165 000
7 chairs in green rep, $25; stand, tongs, and poker, $3	28 00
12 brackets, 24; mahog. card table, $8; mantel mirror, $25; 4 pictures, $20; 1 carpet, $65	110 00
Parlors.	
1 suit of parlor furniture in blue silk, with covers, consisting of 1 sofa, 2 easy chairs, 2 arm-chairs, 2 ladies' chairs, and 1 side chair	175 00
1 suit of parlor furniture in crimson, consisting of 1 sofa, 3 easy chairs, and 2 ladies' chairs	175 00
2 Japanese tables, $5; 1 mahog. table, $15	20 00
1 rosewood table, red cloth cover	25 00
1 " " in green	25 00
1 round inlaid table, $6; 2 large mantel mirrors, $160,	166 00
2 pictures, $8; 2 gilt chandeliers (12 globes each), $75,	83 00
5 cornices, $50; 3 shades at windows, $5	55 00
1 large painting, $50; carpet on floor, $125	175 00
2 rugs	5 00
Library.	
3 book-cases and books, $125; small M. T. table, $8...	133 00
Large library chairs, $20; 3 small library chairs, $10...	30 00
Amt. for'd	2,054 00
Amount forward	$2,054 00
2 cane-seat chairs, $3; 2 Japanese tables, $3	6 00
Mantel clock and figure, $15; wire fender, $2	17 00
1 stand, tongs, &c., $5; bronze figure, $5	10 00
Bronze equest. figure, $10; walnut table and cover, $10	20 00
1 hearth rug, $5; carpet on floor, $70	75 00
13 pictures, $100; 2 bronze brackets, $8	108 00
1 chandelier, $12; 2 cornices, $12; mantel mirror, $85	109 00
2 window shades, $3	3 00
Hall, Parlor Floor.	
New carpet, $35; 3 rugs, $5; mahog. tables, $10	50 00
1 round table, $5; 2 cottage chairs in blue, $20	25 00
1 chandelier, 3 globes, $10; carved bracket, $5; 3 pictures, $25	15 00
3 pictures, $25	25 00

Blue Room.

1 oval gilt mirror, $90; 1 gilt chandelier, $20	110 00
2 chains, $8; small sofa, $30; 2 pictures, $12	50 00
2 candelabras	20 00

Northeast Red Room.

Walnut bedstead, $25; M. T. washstand, $18	43 00
Amount forward	2,740 00
Amount forward	2,740 00
Walnut towel rack, $1; chair, $2	3 00
Table and cover, $2; hair mattress, $20; straw mattress, $3	25 00
Set springs, $5; toilet set, $5; picture on mantel, $1	11 00
Shade, $1; carpet, $20	21 00

Landing, 3rd Floor.

Carpet and bracket, $12	12 00

Hall, 3rd Floor.

Carpet and bracket	8 00

Green Room.

Walnut bedstead, $50; dressing bureau, $35	85 00
Hair mattress, $25; straw mattress, $4	29 00
Set springs, $5; M. T. table, $12	17 00
M. T. commode, $10; mahog. ottoman, $3	13 00
3 cane-back chairs, $6; 1 C. S. chair, $1.50	7 50
1 lounge, $15; hearth rug, $3; carpet, $25	43 00
M. T. washstand, $14; 2 girandoles, $5; towel rack, $1	20 00
2 cornices, $3; 2 window shades, $2; rug, $1	6 00
Fire-iron stand, $1; carpet, $1	2 00

Dressing-room, 3rd Floor.

M. T. dressing bureau, $35; sofa cover, $15; corner etegere, $5	55 00
	3,097 50

Dressing Room, 3d Floor, continued.

	3,097 50
1 mahog. table, $12; wal. wardrobe, $25	37 00
2 c. s. chairs, $3; 1 cane-back chair, $2	5 00
2 cornices, $2; 2 window shades, $2	4 00
Girandole, $3; wire fender, $2	5 00
Blower and stand, $1; shovel, stand, &c., $4	5 00
Carpet, $50; hearth-rug, $5; picture, $3	58 00
Wax picture, $3; lot silver-ware, $1	4 00

Chinese Room.

Wal. bedstead, $50; hair mattress, $25	75 00
Straw mattress, $5; set springs, $5	10 00
1 comfort and sheet, $3; m.-t. dress. bureau, $40	43 00
Washstand, $18; toilet set, $8	26 00
Towel-rack, $1; duchesse table, $8	9 00
Cane-back chair, $2; ladies' easy-chair, $10	12 00
2 ladies' easy-chairs, without arms	14 00
Mahog. ottoman, $3; 2 rugs, $5; carpet, $50	58 00
2 window-shades, $2	2 00

Hall, 4th Story.

Carpet, $5; wardrobe, $10; 2 wire screens, $10	25 00

4th Floor, S. W. Chamber.

Cottage set, viz: bedstead, table, bureau, stand, and 4 chairs	20 00
Bowl, pitcher, and jar, $3; mantel mirror, $5	8 00
2 candelabras, $2; stove, $3; carpet, $15	20 00
Oil-cloth	1 00
Amount forward	3,538 50
Amount forward	3,538 50

Closet

9 comforts, $12; 2 blankets, $3	15 00

Middle Chamber, south

Iron bedstead, $3; mattress, $3; sheet, $1	7 00
Table, $3; small mirror, $1; table, $1; carpet, $10	15 00
Foot-tub, $1; bowl and pitcher, $2	3 00

Closet N. W. Chamber.

Lot carpet and paper	15 00

Servants' Rooms

Bedstead, $3; mattress and pillow, $4	7 00
Chair, $1; table, $3; lot toilet-ware, $2	6 00

S. E. Attic.

Iron bedstead, $2; cotton mattress, $3	5 00
Feather bed, $10; comfort and sheet, $1	12 00
Pillow, $1; 2 old chairs, $1; broken pier table, $2	4 00
Japanese table, $1; bowl and pitcher, $2; mahog. table $3	6 00
Foot-tub and toilet-ware, $4; wardrobe, $3	7 00
Mirror, $1; 2 sashes for store-room, $4	5 00
Pr. andirons, $1; ps. carpet and fireboard, $4	5 00

Passage to Back Building.

8 curtains, cord, and tassels, $25; table, $2	27 00
Oilcloth, $3	3 00

Store-room.

4 striped rep curtains	80 00
4 green and gold curtains, damask	100 00
6 green with borders, $100; 4 green rep curtains, $50.	150 00
Cord and tassels for all	25 00
4 white lace curtains, $20; 4 dotted mus. curtains, $15.	35 00
1 pr. muslin curtains with borders	10 00
Amount forward	4,080 50

Amount forward 4,080 50

Lot globes, $10; 3 lamps, $3; 1 boymn., $1	14 00
1 burner, $1; step-ladder, $2; leaves for table, $12	15 00
Set shades, $3; handles for brushes, $1	4 00
Ice tongs, $1; bbl. cover and shade, $2	3 00
Box for packing, $1; 6 demijohns, $3	4 00
2 jugs and 2 stone jars, $2; jelly jars and scoop, $2	4 00
Set weights, $1 ; step-ladder, $3	4 00

Butler's Chamber.

2 wardrobes, $12; bureau, $3; dressing-table, $2	17 00
Cottage bedstead, $3; straw mattress, $2	5 00
Hair mattress, $8; feather bed, $10	18 00
Blue spread, $3; 2 pillows, $5; mirror, $5	13 00
Bowl and pitcher, $1; 2 rugs, $2; p's carpet, $1	4 00
Lounge, $3; mahog. chair, $1; wooden chair, $1	5 00
Towel-rack, $1; window-shade, $1	2 00

Laundress' Chamber.

Iron bedstead, $2; straw mattress, $2	4 00
Feather bed and pillow, $5; mahog. chair, $1	6 00
Bureau, $3; small glass, $1; bowl and pitcher, $1	5 00
Shade, $1; wardrobe and p's carpet, $5	6 00

Footman's Chamber.

Iron bedstead, $2; straw mattress, $2	4 00
Feather bed and spread, $5; window-shade, $1	6 00
Washstand, $2; wardrobe, $10; bowl and pitcher. $1	13 00
Mirror, $1; p's carpet, $1; chair, $1	2 00
Contents of helper's room	15 00
" " cook's room	20 00
Amount forward	4,273 50

Amount forward	$4,273 50
Lot jars and irons in store-room	20 00
Lot boilers, demijohns, &c., in attic	12 00
Butler's Pantry.	
Mahog. table, $15; water filter, $5	20 00
Wood dish tub, $1; chair, $1	2 00
Rockingham pitcher, $1; 2 oval waiters, $1	2 00
2 porcelain chairs, $2; 19 glass goblets, $9	11 00
21 wines, $10; 4 finger bowls, $10	12 00
12 custard cups and stand, $8; fruit dish, $3	11 00
4 compartiers, $8; 2 salad bowls, $4	12 00
4 gravy boats, $8; 2 leaf dishes, $4	12 00
2 pickle dishes, $2; 2 veg. dishes, $2	4 00
2 oval meat do. $2; 23 dinner plates, $12	16 00
15 supper plates, $8; 7 tea " $4	12 00
Syrup pitcher, $2; 1 wedyum set broken, $2	4 00
Butter bowl, $2; tureen and cover, $2	4 00
Cad tea pot, $1; parien pitcher, $1	2 00
Tea caddy, $1; 2 knife boxes, $1	2 00
24 leaves for dining table, $5; gas lights, $1	6 00
Back Hall.	
1 refrigerator	10 00
Kitchen.	
2 mahog. tables, $15; 4 wood chairs, $2	17 00
Common table, $1; 6 coal hods, $4; clock, $3	8 00
Coffee grinder, $1; tea kettle and dish pan	3 00
Lot of kitchen utensils, consisting of tin-ware, china, iron-ware, &c	67 00
Amount forward	$4,542 50
Amount forward	4,542 50
Laundry.	
Mahog. sideboard, $5; clothes basket, $2	7 00
Boiler, $3; tin pail and 1 pine table, $3	6 00
Clothes horse and skirt board	3 00
Ironing board and 3 old chairs	2 00
Laundry range, $20; clo's wringer and w. board, $4	24 00
Tubs, basin and pitcher, $4; 13 flat irons, $6	12 00
Lamb and soap dish	2 00
Total household furniture	$4,598 50

Stocks, &c.

5 shares Md. Freestone Mining, &c., Manufacturing Company—Seneca	$100 00
Arlington Fire Insurance stock, 50 shares, ½ paid, $2,500	2,200 00
139 shares stock Atlantic Ave. R. R., of Brooklyn	5,000 00
Bonds of Brooklyn and Jamaica R. R., 6,700, 4th mortgage	5,000 00
Bonds Adirondack R. R. Co., 17,000, 1st mtge	8,500 00
1 gold watch	225 00
Total stock, &c	$21,025 00
Stocks, &c	$21,025 00
Furniture	4,598 50
Grand total	$25,623 50

This 16th day of October, A. D. 1874, personally appeared Henry Kennedy, the executor of James C. Kennedy, late of Washington County, deceased, and made oath on the Holy Evangels of Almighty God that the annexed list is a true and perfect inventory of the goods, chattels, and personal estate of said deceased that have come to his hands or possession at the time of the making thereof, and that what hath since or shall hereafter come to his hands or possession, he will return in an additional inventory; that he knows of no concealment of any part of the deceased's estate by any person whatsoever, and that if he shall hereafter discover any concealment, or suspect any to be, he will acquaint the court with the same.

[NOTARIAL SEAL.] N. B. SANBORN,
Notary Public.

STATE OF NEW YORK, } *ss.*
COUNTY OF KINGS. }

I, George G. Herman, clerk of the county of Kings and clerk of the Supreme Court of the State of New York in and for said county (said court being a court of record), do hereby certify that N. B. Sanborn, before whom the annexed deposition was taken, was at the time of taking the same, notary public of the State of New York in and for the said county, dwelling in said county, commissioned and sworn and duly authorized to administer oaths for general purposes; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to said deposition is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said county and court, this 16th day of October, 1874.

{ KINGS COUNTY SEAL. } GEORGE G. HERMAN,
Clerk.

OFFICE OF REGISTER OF WILLS.

DISTRICT OF COLUMBIA, WASHINGTON COUNTY. } *to wit.*

I hereby certify that the foregoing is a true copy from the original inventory of the goods, chattels, and personal estate of James C. Kennedy, deceased, filed and recorded in the office of register of wills for Washington County aforesaid.

Witness my hand and the seal of the Supreme Court of Washington County aforesaid, this 4th day of February, A. D. 1876.

[SEAL.] A. WEBSTER,
Register of Wills.

Supreme Court of the United States.

No. 277.

PHILADELPHIA BAR ASSOCIATION

HARVEY KENNEDY, Executor of JAMES C. KENNEDY,
Appellant,

vs.

JOHN A. J. CRESWELL AND OTHERS, COMMISSIONERS, &c., &c.

Appeal from the Supreme Court of the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

R. T. MERRICK,
M. F. MORRIS,
For Appellants.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 277.

HARVEY KENNEDY, Executor of JAMES C. KENNEDY,
Appellant,

vs.

JOHN A. J. CRESWELL AND OTHERS, COMMISSIONERS, &c., &c.

Appeal from the Supreme Court of the District of Columbia.

BRIEF ON BEHALF OF APPELLANT.

I.

STATEMENT OF CASE.

This suit was instituted by the appellees, Cresswell and others, as Commissioners of the Freedmen's Savings and Trust Company, to recover from the estate of James C. Kennedy, deceased, the value of a certain promissory note of said Kennedy for $12,000 held by them.

The Bill of Complaint, which is a creditor's bill in equity, was filed March 2, 1875. It alleges, in substance, that, by a promissory note dated March 27, 1872, and payable on demand, the said James C. Kennedy, formerly of the city of Washington, in the District of Columbia, became indebted to the Freedmen's Savings and Trust Company, in the sum

of $12,000, with interest at 10 per centum per annum; that Kennedy died on March 25, 1875, leaving a will, executed in 1857, in the State of New York, of which he had been a resident; that of the two executors named in the will one was dead, and the other, his brother, Harvey Kennedy, the appellant in this case, qualified as executor, and received letters testamentary on the estate, on July 22, 1873; that the complainants were advised that the personal property left by James C. Kennedy was insufficient to pay his debts, and had been applied by the executor to the satisfaction of debts against the estate other than the claim held by the complainants; that said claim and others were left unsatisfied; that the executor had failed to render a proper account of the estate; that the deceased had left considerable real estate in Washington; that the will was insufficiently executed to convey said real estate; and that said real estate should be sold to pay the claim of the complainants. The prayer of the bill was for an account of the personal property, a discovery as to the condition of the realty, and for a sale of such realty to pay the debts due from the estate.

To this bill a demurrer was interposed, which was overruled. Thereupon a plea was filed, to the effect that the executor had in his hands assets of the estate amply sufficient to pay all claims against the estate that had come to his notice; and that he was ready and willing to pay the claim of the complainants and all other claims as soon as they should be established by a court of competent jurisdiction; but that he disputed and denied the validity of the claim of the complainants, and they had not attempted in any manner to enforce it at common law.

To this plea a replication was filed, and testimony was taken on behalf of the complainants.

The testimony was to the effect that the note had not been paid, at least while the witness who testified about it was connected with the Freedmen's Bank; and that second mortgage bonds of the Maryland Freestone Mining and Manu-

facturing Company of Montgomery County, Maryland, had been deposited with the bank as collateral security for the note, and the bank yet held that security. Two inventories and the executor's first account filed in the probate court, were also offered in evidence on behalf of the complainants; but they seem never to have been filed, as they do not appear in the record.

No testimony was taken on behalf of the defendant, as none was deemed necessary at the time in view of the character of the testimony on behalf of the complainants.

In the meantime, the trustee in bankruptcy of the estate of Jay Cooke and company had intervened by petition as a creditor of the estate of James C. Kennedy on account of a promissory note for $3,500 held by him. To this petition a demurrer was interposed, which was never brought to a hearing. In fact, this claim for $3,500 is pending in another suit between the said trustee and the estate of James C. Kennedy.

At the hearing in the special term on the bill, plea, and depositions, the Court ordered a reference to the auditor to state an account. From this the defendants appealed to the general term. When the case came on for hearing in the general term, the complainants abandoned their decree, and the case was remanded to the special term for further proceedings. Thereupon, without any further intervening proceedings, the special term heard the case again, and rendered a personal decree against the executor, on his admission of assets, for the payment of the note and interests.

An appeal was again taken by the defendant, Harvey Kennedy, the executor, to the general term; but the general term affirmed the last decree of the special term. And from that decree of affirmance the executor appeals to this Court.

II.

ASSIGNMENT OF ERRORS.

1. The court below erred in rendering a personal decree against the executor for the payment of the claim of the complainants.

2. The court below erred in not dismissing the complainants' bill.

III.

BRIEF OF ARGUMENT.

1.

The decree from which the present appeal is taken, is expressly predicated upon the admission by the executor of a sufficiency of assets in his hands to pay the claims against the estate. By electing to take this personal decree against the executor, the complainants have abandoned their proceedings against the heirs-at-law and the real estate of the deceased; and the testimony upon the question of the alleged insufficiency of assets is no longer to be considered. It is respectfully submitted, that, under these circumstances, the only decree proper to have been made was one dismissing the complainants' bill.

2.

A plea is a statement of some matter of fact, generally not apparent on the bill itself, which, if true, should bar the further prosecution of the suit.

Daniell's Chancery Pr., p. 677.
Story's Equity Pleadings, Sec. 652.

If a plea, whether true or false as matter of fact, is deemed

insufficient in law as a defense, it should be set down for hearing, like a demurrer. If it is not set down for hearing, and the complainant files a replication to it, he admits its validity and sufficiency in law, if true, the same as if it had been allowed upon argument; so that if the defendant, at the hearing, proves his plea to be true, the bill must be dismissed. The replication is an admission of the sufficiency of the facts pleaded as a bar, if true.

Daniell's Chancery Practice, p. 795.
Alexander's Chancery Practice, p. 60.
Hughes *vs.* Blake, 6 Wheaton, 472.
Bogardus *vs.* Trinity Church, 4 Paige, 178.
Fish *vs.* Miller, 5 Paige, 26.
Gernon *vs.* Boccaline, 2 Wash. C. C., 199.
Daniell *vs.* Taggart, 1 Gill & Johnson, 311.
Rhode Island *vs.* Massachusetts, 14 Peters, 257.
Downes *vs.* McMichael, 2 Paige, 345.
Gallagher *vs.* Roberts, 1 Wash. C. C., 320.

The decree finds the plea to be true, in fact; and therefore the bill should have been dismissed.

3.

At all events, the bill should have been dismissed as against the heirs-at-law and the real estate of the deceased.

The decree is silent as to the heirs; but, inasmuch as it retains the bill "for further proceedings in behalf of the other creditors," the inference is, that, under it, the real estate may still be reached.

Now, under the laws in force in the District of Columbia, the real estate of a deceased person cannot be subjected to the satisfaction of debts due by him, except upon an insufficiency of personal assets, admitted or proved. The personal property is the primary fund for the payment of debts, and

the real estate is not to be resorted to, until the personalty is exhausted.

Wyse *vs.* Smith, 4 Gill & Johnson, 295.
McKay *vs.* Green, 3 Johnson's Ch., 57.
Ingle *vs.* Jones, 9 Wallace, 486.

4.

But the bill cannot be maintained even as against the executor.

It must be conceded, of course, that equity has jurisdiction to make executors and administrators account, as trustees. And it may be conceded, also, for the purpose of the present point, that the bill in this case seeks an account and states a proper case for the jurisdiction of a court of equity.

But the decree appealed from here does not direct an account; nor is it predicated upon any account taken. There never has been any account taken. The case, as determined by the final decree, stands precisely as if the complainants had filed their bill, alleging that they were the holders of an overdue promissory note of the deceased, which the defendant executor refused to pay, although having abundant assets in his hands, and praying that he be required to pay it, on the ground that his failure so to do was a violation of his trust.

Now, it is respectfully submitted that a court of equity has no jurisdiction in a case like that, under the laws in force in the District of Columbia.

In the absence of power in the common-law courts to control executors and administrators, the court of chancery in England has assumed jurisdiction, upon admission or proof of sufficient personal assets, even without an account, to compel the payment of debts and legacies, upon the ground of the fiduciary character of executors and admin-

istrators. But no such practice obtains with us, and the jurisdiction cannot exist, in view of the powers conferred by statute upon the probate and common-law courts.

In pursuance of the constitutional provision in respect to the right of trial by jury in cases proper for the cognizance of the common-law courts, and also of the 16th section of the judiciary act of September 24, 1789, (1 Statutes, p. 83,) this Court has frequently decided, and it is settled law, that, "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Hipp *vs.* Babin, 19 Howard, 278.
Parker *vs.* Winnipiseogee Co., 2 Black, 545.

And it has also been laid down, that "the absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend upon *the character of the case*, as disclosed in the pleadings."

Watson *vs.* Sutherland, 5 Wallace, 74.

Now, the act of Assembly of Maryland of 1798, Chap. 101, sub-chap. 8, sec. 5, (Kilty's Statutes of Maryland,) which is in force in the District of Columbia, provides, as follows:

"Executors and administrators shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, (*as the case may require*,) which the testator or intestate might have commenced and prosecuted, except actions of slander, and injuries for torts done to the person; and they shall also be liable to be sued in any court of law or equity, (*as the case may require*,) in any

action, (except as aforesaid,) which might have been maintained against the deceased."

If the character of the case is to determine the jurisdiction, as laid down in the opinion cited from 5th Wallace, there is no doubt that the case made here by the pleadings and decree is cognizable in the common-law courts; and therefore the court of equity has no jurisdiction, and the bill should have been dismissed.

5.

It appears to us that the decree appealed from is erroneous from every point of view, and should be reversed. But shall it be reversed and remanded with directions to the court below to dismiss the bill, or merely remanded for further proceedings?

We submit that sufficient ground has already been shown why the bill should be dismissed. But, in addition, it may be noted that there is no evidence in the record to support a decree for an account, which would have been the only proper alternative to a decree dismissing the bill.

There is no proof of the claim of the complainants. The promissory note claimed to be held by them, has not been put in evidence. It nowhere appears in the record. On page 11 of the record, where all the testimony in the case is to be found, certain certified copies of papers said to have been filed in the office of the Register of Wills, purport to have been offered in evidence. They do not seem to have ever been filed; and we can argue nothing whatever from them. As far as the record of this case shows, there is not a particle of proof in support of any of the allegations of the bill; and we respectfully submit that, upon the proof, as it stands, the court below should have dismissed the bill.

6.

The case made by this record requires that the decree of the Supreme Court of the District of Columbia be reversed, and the case remanded to that Court with directions to dismiss the complainants' bill.

R. T. MERRICK,
M. F. MORRIS,
For Appellants.

OFFICE SUPREME COURT U. S.
FILED
APR 21 1880
J. W. MIDDLETON, CLERK.

IN THE

Supreme Court of the United States.

No. 277.—October Term, 1879.

HARVEY KENNEDY, Executor, &c., Appellant,

vs.

JOHN A. J. CRESWELL ET AL., Appellees.

BRIEF FOR APPELLEES.

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IN THE

Supreme Court of the United States.

No. 277.—October Term, 1879.

Harvey Kennedy, Executor, &c., Appellant,

vs.

John A. J. Creswell et al., Appellees.

BRIEF FOR APPELLEES.

This is an appeal from a decree of the Supreme Court of the District of Columbia.

On the 2d day of March, 1875, the appellees in this cause, who are the Commissioners of the Freedman's Savings and Trust Company, exhibited their bill in the Supreme Court of the District of Columbia, as well for themselves as for all other creditors of the estate of James C. Kennedy, deceased, against Harvey Kennedy, the executor of the last will and testament of said James C. Kennedy, and several other defendants, some of whom are beneficiaries under the will.

The bill alleges that being indebted to the Freedman's Savings and Trust Company in the sum of $12,000, James C. Kennedy made his promissory note for that sum, bearing date March 27, 1872, payable on demand, and delivered the same to the Trust Company, and that payment

had been demanded long before that time. Being so indebted Kennedy died, on the 25th of March, 1873, in the city of Washington, leaving a last will and testament, which was executed in the city of New York, bearing date February 10, 1857, whereby he made sundry bequests, and that the defendant, Harvey Kennedy, and one Daniel Stewart (since deceased) was by said will named as executors thereof; that letters testamentary of all and singular the personal estate of James C. Kennedy was granted, on the 22d day of July, 1873, to said Harvey Kennedy, and that he had possessed himself of all the personal property of the deceased. It was averred in the bill that the personal property of the deceased was insufficient to pay the debts of the estate, and that said Harvey Kennedy had applied the personal property to the payment of other debts against the estate, leaving the debt due to the Trust Company, as well as other debts amounting to a large sum, wholly unpaid, and that said Harvey Kennedy had neglected to render a proper account of and concerning said personal estate; for these reasons the complainants claimed that they were entitled to have the real estate of the deceased sold and the proceeds applied to the payment of the debts. Several pieces of real estate (some incumbered and some unincumbered) situated in the city of Washington are described in the bill as being the property of which the said testator died seized and possessed, either wholly or in part. It also appears from the bill that the said will was signed by only two subscribing witnesses, and that it was made long prior to the acquisition, by the testator, of the property described in the bill. The bill alleges that the complainants therein were duly appointed and qualified Commissioners of the Freedman's Savings and Trust Company, under and by virtue of the provisions of the act of Congress, approved June 20, 1874.

The bill prays that the defendant, Harvey Kennedy, may be compelled to account for the personal property by him received from the estate, and to discover the real

estate within the District and its condition, and that such real estate may be sold, or so much thereof as might be necessary, and that the proceeds be applied to the payment of the debts due from the estate, and for general relief.

To this bill the defendants interposed a demurrer (4), which was overruled, with leave to "answer" within thirty days.—(5.)

After the demurrer had been overruled, the petition of Edwin M. Lewis, trustee of the estate of Jay Cooke & Co., bankrupts, was filed, in which it was alleged that an overdue note for the sum of $3,500 was held by the petitioner and was unpaid; the petitioner prayed to be made a party to this cause and for leave to prosecute the said note.—(5.) To this petition the appellants demurred.—(8.) It does not appear that this demurrer was ever disposed of.

On the 9th of September, 1875, the defendants below filed a plea to the bill of complaint, in which it was admitted that the defendant, Kennedy, as executor, "has in his hands assets of the estate of the said James C. Kennedy, deceased, amply sufficient to pay and discharge the claims of the complainants and all other claims that have been brought to his notice;" the defendants also, by the plea, declared that the executor was ready and willing to pay the complainants' claim as soon as it should be established according to law. The plea then sets up as a defence that the executor disputed said claim and denied its justice and validity, and to complain that the complainants had not sought to enforce their claim "by proper proceedings at law."

This paper is sworn to be true by the appellant, Harvey Kennedy, the executor, on the 7th day of September, 1875.

To this plea the complainants filed a replication, in which it is asserted that their claim is just and valid, and issue is joined on the plea (10); thereupon testimony was taken by the complainants in support of their claim; they also introduced the proceedings in the matter in the Pro-

bate Branch of the Supreme Court of the District of Columbia, taken by and on behalf of the said defendant, Harvey Kennedy.

By the account rendered to the probate court, and sworn to by the executor on the 16th day of October, 1874, he charges himself with personal property amounting to the sum of $31,794.63. But from this sum he deducts $23,423.50 for furniture, stock, &c., still on hand and unsold, leaving a balance of personal estate amounting to $8,371.13 to be accounted for. With this property in hand the executor claims that he has disbursed for the estate the sum of $27,014.70. If we add to this sum total of debts the amount of the complainants' note and that of Cooke & Co.'s trustee, say $20,000.00, the debts of the estate amount to $47,014.70 at least. Deducting the amount of the assets, as shown by the inventory, from the amount of debts, leaves a deficiency of assets of about $14,000.00. But notwithstanding this sworn account this same executor, without any explanation, swore to a plea in this cause, on the 7th of September, 1875, which contains the unqualified allegation that he has in his hands assets of the estate, "amply sufficient to pay and discharge the claim of the complainant and all other claims that have been brought to his notice."

The evidence shows that the note upon which this action is based was presented to the executor soon after the letters testamentary were issued to him, and that it was also presented to his attorney. The records of the office of the Register of Wills show that the note was presented there and regularly "approved and passed" by an order of the court on the 9th day of June, 1874, and that it remains on the files of the court, as a part of the accounts and records relating to the estate in question. It also appears that on the 11th of November, 1874, the complainants filed in the probate court exceptions to the account and proceedings of the executor. The complainants introduced the note with the probate thereof attached, and proved the signature and

delivery of the note, and that it constituted a part of the assets of the Trust Company in the hands of the commissioners, and that it was unpaid. The defendant offered no evidence whatsoever.

The cause was regularly heard on the pleadings and evidence at the special term of the court, and a decree was there made (13) that the debt was just and valid; it was also decreed that Harvey Kennedy, the executor, having admitted assets in his hands sufficient to pay the debts of the estate, the complainants should recover from the said Harvey Kennedy the said sum of $12,000.00 with interest and costs, and that the cause be retained for further proceedings in behalf of other creditors.

From this decree none of the defendants appealed except Harvey Kennedy, the executor; the general term of the court on the 26th day of June, 1877, heard this appeal and affirmed the decree, and the cause was then removed here on appeal by Kennedy.

Argument and Authorities.

The complainant proceeded in the court below upon the theory that the personal property of the estate was insufficient to answer to the claims due from the estate, and in addition to this ground, the executor is charged in the bill with maladministration of the personal property. The object of the complainants was, in the first place, to secure from this executor a proper account and a fair application of the personal estate, in order to ascertain the extent of the deficiency, and, in the second place, to secure the sale of a sufficient quantity of the realty to answer such deficiency. The averment in the bill that the personal property was insufficient was in accordance with the first account of the executor, made October 16, 1874.—(Add'l Record, 2.) This account shows that the personal estate was valued at $31,794.62; the executor therein claims credit, at that date, for $24,902.19 paid out

for the estate; it also shows that he still had on hand $23,-423,50 of the personal property. He claims to have paid out $18,643.63 more cash than he had received. His attention was directed to the errors he had committed on the 17th day of November, 1874, by the complainants, who, on that day, filed exceptions to his first account.—(Add'l R., 1.)

This account of the personal property could leave no room for doubt in the minds of creditors that the assets were insufficient to pay the debts. The commissioners were fully justified in assuming that the statements of the executor were true, and in proceeding upon that assumption in the chancery court. Indeed there was no other course left for them to adopt.

There are ample grounds upon which the jurisdiction of the equity court can be sustained. Insufficiency of assets and misbehavior of the executor in his dealings with the trust property in his hands, without more, constitute excellent reasons for appealing to the equity jurisdiction, and the discovery prayed, as to the realty and the amount of the debts remaining charged upon it, were additional grounds for equity jurisdiction. Even if the court was concluded by the last statement of the executor touching the sufficiency of assets, his extraordinary and suspicious conduct entitled the complainants to a strict accounting as to the personalty. In addition to this, the creditors of a deceased person may file a bill (commonly called a creditor's bill) singly or together in behalf of one or all, "for an account of the assets, and a due settlement of the estate." Bills of this sort are allowed on the mere principle that equality is equity, and that the executor or administrator shall not be permitted to show preference in favor of any creditor.—(See Story's Eq. Juris., §§ 546, 547, 548, 548a; also Appellant's Brief (p. 6) where this is admitted.)

"A creditor has a right to come here for a discovery of assets. This is a settled and necessary right. *When here*, said Lord Hardwicke (2 Atk., 363; 3 Atk., 263), *he shall*

not be turned over to a suit at law and put to that expense. He shall be decreed satisfaction here for his debt, and this upon the ground of preventing multiplicity of suits."

Thompson vs. Brown, 4 John. Ch. Reports, 630.

"A creditor may file his bill for payment of his own debt and seek a discovery of assets for this purpose only. If he does so, and the bill is sustained and an account is decreed to be taken, the court will, upon the footing of such an account, proceed to make a final decree in favor of the creditor *without sending him back to law for the recovery of his debt;* for this is one of the cases in which a court of equity, being once in rightful possession of a cause for a discovery and account, will proceed to a final decree upon all the merits."

1 Story's Equity Jurisprudence, sec. 546.

The bill was exhibited by the complainants in their own behalf and in behalf of all other creditors, and at the first hearing a decree for an accounting was passed (12), but the executor not being content with this, took an appeal to the general term, and there that decree was reversed and the cause was remanded for further proceedings. If the executor had been desirous of bringing about a speedy and unexceptionable settlement of the estate, he could have secured it through that decree. Upon that decree the executor would have been entitled to an injunction to restrain all proceedings at law so that he should not be embarrassed by a multiplicity of suits.

Story's Eq., § § 548, 549.

The appellant relies with apparent confidence upon the error assigned that the decree appealed from could not be based upon the case as it stood at the hearing, but that the bill should have been *dismissed.* The object of this appeal, if there is any object other than delay and litigation, is to drive the complainants into a court of law to prosecute their claim, so that the executor may there *plead the statute of limitations in bar of the action.* The statute of limitations began to run on the first day of June, 1874, when the note

was presented to and "passed and approved" by the probate court (Add'l R., 2), if it had not begun to run before that date. There is no defence to the note; the first intimation that the debt was disputed, was given in the plea of September, 1875. But no effort was made by the defendants to prove the assertion in the plea that the claim was invalid. The cause went to final hearing on the testimony of the complainants in support of their debt. It will not be forgotten, in this connection, that the claim had been "passed" by the probate court nearly a year before this plea was sworn to by Kennedy, and stood as a just claim against the estate.

An effort of an executor to defeat a just claim against the estate which he represents by technical defences and persistent litigation is iniquitous. It is no part of his duty to cheat honest creditors; on the contrary, the statute declares that "it shall be the duty of all executors and administrators to pay all just claims against the deceased exhibited to them, or a proportionate part thereof according to the assets."—(Act of Md. 1798, ch. 101, sub. ch. 5, § 10.) The complainants are not in fault; they were driven into the equity court by the misbehavior of the executor; whether accidental or intentional can make no difference. He is now estopped from taking advantage of his own wrong. To permit him to come in by a plea, in which he swears the assets are amply sufficient, having before upon his oath shown that they were insufficient, and thus turn the complainants over to the law court, to be defeated by the statute of limitations, would be using an equity court for purposes far removed from administering justice. This claim now amounts to over $17,000.00.

The decree appealed from was the proper decree in the case. Ordinarily the real estate of the deceased will not be sold to pay debts until the personalty shall have been exhausted. Here the executor by his plea disclosed and admitted a sufficiency of assets in his hands to pay all

the claims, and the only issue was as to the validity of the claim.

The plea of the defendants starts out with the ordinary protestation, and then sets up, as a single matter of defence, that the claim of the complainants is unjust. He declares as a matter of inducement and explanation that the refusal to pay the debt was not owing to a deficiency of assets, by admitting that he has in his hands asset belonging to the estate "amply sufficient" to pay all claims, and that he is ready and willing to pay the claim of the complainants as soon as it shall have been established by a tribunal of competent jurisdiction, and then he avers that he disputes the said claim and denies the justice and validity thereof, and has for that cause rejected the same.

It was not a matter of "defence" to say that the executor had in his hands assets sufficient to pay all the debts, nor was it a defence to declare that he was ready and willing to pay if the debt was decided to be just. But it was a "defence" to say that the claim was unjust and invalid. The only issue tendered, therefore, was as to the validity of the debt, and that was the only issue raised.

Any other view of the plea would render it "double," and in violation of one of the best known rules applicable to pleas in equity. The issue on the "defence" presented by the plea must always be single, except only in special instances, where the court on special application allows a double defence for convenience. If the words of the plea admitting assets were put in issue, then the statement that the executor "is ready and willing to pay" must have been also put in issue. Both of these averments were immaterial, so far as the pleading was concerned. The immateriality of the admission of assets in the plea will be more apparent when we consider that the authority of the equity court did not depend upon the question of insufficiency of assets. The bill discloses and the evidence establishes abundant cause for the interposition of the equity court, without reference to the question of sufficiency of

assets, and hence those statements must be considered as not issuable. The admission of assets in the plea can perform no office except to put the court in possession of the facts necessary to enable it to pass the proper decree, if the issue raised by the plea and replication, as to the validity of the debt, should be found against the executor. In view of the first inventory and account rendered by the executor, the court, upon this plea, sworn to by the executor, admitting assets "amply sufficient" to pay all the debts of the estate, was bound to conclude (it was, at least, charitable to conclude) that additional assets had come to his hands since his first account was filed.

It does not appear that the executor filed an additional inventory as the law requires; the act of Maryland of 1798, which governs the conduct of executors, provides that "whenever personal property of any kind, or assets, not mentioned in an inventory already made out, shall come to the possession or knowledge of an executor * * * an account or inventory of the same shall be returned * * * within two calendar months from the time of the discovery."

There is no error in the decree; the complainants' replication put in issue the charge that the debt was invalid; the complainants proved the validity of the debt and the executor was silent. The court found as matter of fact that the claim was just and valid; upon this condition of the case but one decree could follow: a personal decree against the executor for the payment of the debt.

"The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."—(33 Eq. Rule Sup. Ct. U. S., and, also, the 29th Eq. Rule Sup. Ct. D. C.)

"The course of procedure on a plea will depend on the view taken by the plaintiff as to the sufficiency in law or the truth in fact of the *defence*. If he thinks the plea valid, but that he can meet it by amendment, he may do so. If

he thinks it invalid he may set it down for argument. If he thinks it untrue he may file a replication and go to a hearing on the issue on its truth. If the plea be overruled on argument the defendant must answer. * * * If it be allowed on argument, its validity is established, but the plaintiff may still file a replication, and go to a hearing on the question of its truth. * * * If the plea be replied to, either originally or after its allowance on argument, the cause will be brought to a hearing on the single question of its truth. If it is sustained by the evidence, there will be a decree for the defendant. If it is disproved he can set up no further defence, *but a decree will be made against him.*"—(Adams' Eq., 341; Daniel's Ch. Pr., 717.)

The fact being admitted that the assets were sufficient, the complainants were entitled to the decree for payment without waiting for the final settlement of the estate. The payment to them could not prejudice the other creditors.

In the case of Woodgate vs. Field (2 Hare, 211) Mr. Chancellor Wigram said:

"The suit is instituted by a simple contract creditor on behalf of himself and all other creditors, seeking the payment of a debt alleged to be secured by the promissory note of the intestate. The defendant, by his answer, says, he believes the note to be a forgery, and that no debt was due to the plaintiff, but admits assets sufficient to pay the amount, and all other debts of the intestate. He suggests no ground for his belief as to the debt and note. Evidence has been gone into on the part of the plaintiff to prove the debt, and he asks an immediate decree for payment. The defendant says it ought to be referred to the master to take the account, not only of the estate, but of what other debts are owing from the testator.

"This inquiry is said to have two objects: one that the plaintiff's debt may be proved in the master's office; the other that the rest of the creditors may have an opportunity of getting their debts paid in the suit.

"In a creditor's suit, where there is no admission of assets, that is, no doubt, the usual form of the decree, and though the plaintiff may have proved his debt at the hearing, it may still be displaced by evidence in the master's office; but the question is, whether that form of decree is applicable when assets are admitted?

"The reason for, and the principle of, the usual form of decree, are stated in Owens vs. Dickinson (1 Cr. & Phill.), but that reasoning has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt.

"In such a case, the other creditors cannot be prejudiced by a decree for payment of the plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails.

"I entertained no doubt upon this point, nor can I, upon inquiry, find that it was ever doubted in the other branches of the court. In effect, the rule is proved by the fact that the creditor and the defendant, the executor, may settle the matter, pending the suit, by the latter paying the debt and costs of the suit. And it has twice been decided at the Rolls, that the court will order the same thing to be done, even when the suit had proceeded to a considerable extent. If, then, the court would compel a creditor to accept payment of his debt when the executor offers to pay it, with the costs of suit, where is the line to be drawn beyond which the plaintiff cannot be allowed to have the exclusive benefit of his own suit?

"I am satisfied that in this case there ought to be a decree for immediate payment."

See 1 Story's Eq. Juris., § 548 a.

The executor alone took this appeal. He is not injured in any manner by the decree. All the decree does is to re-affirm the action of the probate court in declaring the validity of the debt. He has in his hands sufficient assets to pay all the debts, and a tribunal of competent jurisdiction has declared this claim to be valid, and no harm can come to him by paying it. Indeed the executor might, with perfect safety, have paid the debt on the approval of the probate court. The order of that branch of the court would have protected him. The law provides that "no executor or administrator shall discharge any claim against the deceased (otherwise than at his own risk) unless the same be first passed by the Orphans' Court, granting the administration, or unless the said claim be proved according to the following rules."—(Act of Md. Assembly,

1798.) And if an executor, in good faith, pay a claim thus "passed," his right to credit for the same cannot be controverted.

Owens vs. Collinson, 3 G. & J., 38.

The peculiar vice of the position assumed by the executor in this cause consists in his remarkable facility for swearing to irreconcilable statements. He went into the probate branch of the court in October, 1874, and made oath to an inventory and an account showing that the personal property fell far short of being sufficient to pay the debts of the estate; relying upon the truth of this statement of the executor, the creditors, instead of bringing their actions at law, applied to the equity court to sell the real estate to pay the debts. Then the executor went into the equity court, and for the purpose of ousting that court of jurisdiction, made oath, on the 7th of September, 1875, that the assets in his hands were amply sufficient to pay all the debts. Pending these proceedings the statute of limitations barred their action at law on the claim. He now asks this court to aid him in defeating a just debt by such instrumentalities.

It is deemed not improper to suggest to the court that the second paragraph of the twenty-third rule ought to be applied in this case, and that the executor ought to be personally charged with damages for this delay and pertinacious litigation.

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